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Note by the Coordinator of the Subcommittee on Exchange of Information: proposed revised article 26 (Exchange of information) and proposed revised commentary (2008) on article 26 (paras. 1-3)*

Summary

The present note has been prepared by the Subcommittee on Exchange of Information in response to the recommendations made by the Committee of Experts on International Cooperation in Tax Matters at its second and third sessions for the amendment of article 26 (Exchange of information) of the United Nations Model Double Taxation Convention between Developed and Developing Countries (ST/ESA/PAD/SER.E/21). The proposed changes expand the scope of information exchanges to include, for example, all national and subnational taxes. Also some exceptions to an exchange of information have been removed, including the exception for domestic bank secrecy laws. The proposed revised text of article 26 is included. Major changes to the commentary are also recommended to reflect changes to the text of article 26 and to address new issues. The proposed revised commentary (2008) on article 26 is provided in the present document (for paras. 1-3) and in document E/C.18/2008/3/Add.1 (for paras. 4-6).

* The views and opinions expressed in the present note are those of the Subcommittee on Exchange of Information and do not necessarily represent those of the United Nations. The proposed revised commentary (2008) on article 26 of the United Nations Model Convention is contained in the present document (paras. 1-3) and in document E/C.18/2008/3/Add.1 (paras. 4-6).

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* See E/C.18/2008/3/Add.1.

I. Proposed revised article 26 (Exchange of information) of the United Nations Model Convention

1. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws of the Contracting States concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention. In particular, information shall be exchanged that would be helpful to a Contracting State in preventing avoidance or evasion of such taxes. The exchange of information is not restricted by articles 1 and 2.

2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State. However, if the information is originally regarded as secret in the transmitting State, it shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:

(a) To carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;

(b) To supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

(c) To supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (*ordre public*).

4. If information is requested by a Contracting State in accordance with this article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

6. The competent authorities shall, through consultation, develop appropriate methods and techniques concerning the matters in respect of which exchanges of information under paragraph 1 shall be made.

II. Proposed revised commentary (2008) on article 26 (Exchange of information) of the United Nations Model Convention*

A. General considerations

1. Article 26 embodies rules under which information may be exchanged to the widest possible extent, both to facilitate the proper application of the treaty and to assist the Contracting States in the enforcement of their domestic tax laws. Consequently, the obligation to exchange information under this article should be interpreted broadly, and the limitations on that obligation should not be extended by analogy beyond their specific meaning. In particular, the article should be understood to require the Contracting States to promote an effective exchange of information.

1.1. In a global economy, cooperation among nations on fiscal matters has become increasingly important, and the former reluctance of nations to concern themselves with the revenue laws of other countries mostly has disappeared. Article 26 provides a basis for the effective exchange of information between the Contracting States, whereas article 27 provides for assistance in collection. From the perspective of many developing countries, article 26 is particularly important not only for curtailing cross-border tax evasion and avoidance, but also to curtail the capital flight that is often accomplished through such evasion and avoidance.

1.2. Much of the language of article 26 is also found in the comparable article of the OECD Model Convention. Consequently, the OECD commentary to that article generally is relevant in interpreting article 26 of the United Nations Model Convention. It should be understood, nevertheless, that article 26 is intended to be broader in a number of respects than the comparable provision in the OECD Model Convention.

1.3. Although article 26 imposes reciprocal obligations on the Contracting States, it does not allow a developed country to refuse to provide information to a developing country on the ground that the developing country does not have an administrative capacity comparable to the developed country. Reciprocity has to be measured by reference to the overall effects of a treaty, not with respect to the effects of a single article.

2. The text of paragraph 1 of article 26 makes clear that the exchange of information is not restricted by article 1 (Persons covered) or article 2 (Taxes covered). Consequently, the information exchanged may relate to persons who are not resident in either Contracting State and to the administration or enforcement of taxes not mentioned in article 2. Some countries may object to the extension of paragraph 1 to all taxes, for constitutional reasons or other reasons. Those concerns are addressed in section B below.

3. Following the pattern of the 2005 OECD revisions, paragraph 1 of article 26 was broken up into three separate paragraphs, now paragraphs 1, 2 and 6. This paragraphing change was made for clarity and has no substantive significance.

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* See E/C.18/2008/3/Add.1.

4. Article 26 was modified substantially in 2008, with a view to clarifying certain issues, expanding the scope of the article, and limiting exceptions to the obligation to exchange information. In some cases, the changes made were not intended to be substantive, but rather were intended to remove doubts as to the proper interpretation of the article. For example, the term "necessary" in paragraph 1 was changed to "foreseeably relevant" to clarify the intended meaning of the prior language. In contrast, the change in that paragraph providing for an exchange of information with respect to taxes not mentioned in article 2 was intended to be a substantive change. Another example of substantive change is the addition of paragraph 4, which implies the removal of domestic tax interest requirement.

4.1. In some cases, the issue of whether a change made to article 26 is intended as substantive or interpretative depends on the prior practices of the Contracting States. For example, in some cases, the addition of paragraph 5, which removes, inter alia, domestic bank secrecy laws as a basis for refusing to exchange information, may simply clarify the meaning of the limitations on the exchange of information contained in paragraph 3. In other cases, it may modify that paragraph substantively. The effect of the change depends in part on the particular prior practices of the Contracting States. The position taken in the OECD commentary is that paragraph 5 is primarily interpretative with respect to treaties between its member States. This issue may be of particular importance in interpreting treaties that entered into force prior to the adoption of the 2008 changes to article 26.

4.2. One difference in the wording of article 26 and the comparable provision of the OECD Model Convention is that article 26 includes in paragraph 1 the following sentence: "In particular, information shall be exchanged that would be helpful to a Contracting State in preventing avoidance or evasion of such taxes." The phrase "that would be helpful to a Contracting State in preventing avoidance or evasion" was inserted in 2008. That change was thought to be useful by members of the Committee, especially members from developing countries, to make clear in the text of article 26 a point that already was clear in the commentary and was implicit in the language of the last sentence of prior paragraph 1, now revised and moved to paragraph 6. The statement of the purposes of information exchanges in the text of article 26 is intended to provide guidance to the Contracting States on the proper interpretation of the article.

4.3. Although tax evasion is illegal and tax avoidance is not, both result in the same loss of revenue to the government, and, by definition, both defeat the intent of the government in enacting its taxing statutes. Consequently, mutual assistance in combating tax avoidance is an important aspect of mutual cooperation on tax matters. In addition, some forms of aggressive tax avoidance are so close to the line between avoidance and evasion that a Contracting State is unlikely to know for sure whether the information it is requesting deals with avoidance or evasion until after it obtains the requested information. Information on tax avoidance may be extremely useful to a Contracting State in its efforts to close possible loopholes in its taxing statutes.

5. The term "exchange of information" should be understood broadly to include an exchange of documents and an exchange of information unrelated to specific taxpayers and the provision of information by one Contracting State whether or not information is also being provided at that time by the other Contracting State.

5.1. If specifically requested by the competent authority of a Contracting State, the competent authority of the other Contracting State should provide information under article 26 in the form of depositions of witnesses and authenticated copies of unedited original documents (including books, papers, statements, records, accounts or writings), to the extent feasible. Under paragraph 3, the requested State may decline to provide the information in the specific form requested if, for instance, the requested form is not known or permitted under its law or administrative practice. A refusal to provide the information in the form requested does not affect the obligation to provide the information.

5.2. Contracting States may wish to use electronic or other communication and information technologies, including appropriate security systems, to improve the timeliness and quality of exchanges of information. Indeed, the Contracting States may be obligated to provide requested information in electronic form if such action is necessary for an effective exchange of information. Contracting States which are required, according to their law, to observe data protection laws may wish to include provisions in their bilateral conventions concerning the protection of personal data exchanged. Data protection concerns the rights and fundamental freedoms of an individual, and in particular, the right to privacy, with regard to automatic processing of personal data. In no event is a Contracting State relieved of its obligation to exchange information simply because its domestic laws do not allow it to provide the information in the form requested.

5.3. The scope of exchange of information covers all tax matters without prejudice to the general rules and legal provisions governing the rights of defendants and witnesses in judicial proceedings. Exchange of information for criminal tax matters can also be based on bilateral or multilateral treaties on mutual legal assistance (to the extent that they also apply to tax crimes).

5.4. Article 26 provides in paragraph 6 that "the competent authorities shall, through consultation, develop appropriate methods and techniques concerning the matters in respect of which exchanges of information under paragraph 1 shall be made". This language authorized the competent authorities to exchange information in at least three modes: exchange by specific request, automatic exchange, and other exchanges, understood to include spontaneous exchanges.

5.5. Nothing in the United Nations Model Convention prevents the application of the provisions of article 26 to the exchange of information that existed prior to the entry into force of the Convention, as long as the assistance with respect to this information is provided after the Convention has entered into force and the provisions of the article have become effective. Contracting States may find it useful, however, to clarify the extent to which the provisions of the article are applicable to such information, in particular when the provisions of that Convention will have effect with respect to taxes arising or levied from a certain time.

6. The Committee of Experts has suggested some guidelines for arrangements regarding the implementation of appropriate exchanges of information. (See E/C.18/2008/3/Add.1, sect. C.) Those guidelines are in the form of an inventory of options available to the competent authorities. The inventory is not intended to be exhaustive or to impose any procedural obligations on a Contracting State. Instead, the inventory is a listing of suggestions to be examined by competent authorities in developing procedures for an effective exchange of information.

B. Commentary on article 26

Commentary on paragraphs 1-3 of article 26

Paragraph 1

7. The first sentence of paragraph 1 sets forth the basic obligation of the Contracting States concerning the exchange of information. It requires, subject to the limitations of paragraph 3, that the competent authorities exchange such information as is "foreseeably relevant" for the proper application of the Convention or for the administration or enforcement of their domestic tax laws, as long as taxation under those laws is not inconsistent with the Convention.

7.1. Prior to the 2008 changes to article 26, the term "necessary" was used instead of the term "foreseeably relevant". The view of the Committee and the OECD commentary has been that these terms have similar, if not identical, meanings. That is, the term "necessary" is understood to mean "appropriate and helpful", not "essential". In any event, whatever the phrase chosen, the requesting State is not obliged to demonstrate its need for the requested information before the obligation to provide that information arises.

7.2. The standard of "foreseeably relevant" is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Contracting States are not at liberty to request information about a particular taxpayer that is highly unlikely to be relevant to the tax affairs of that taxpayer. Contracting States may agree to an alternative formulation of this standard that is consistent with the scope of the article. For example, they might replace "foreseeably relevant" with "necessary" or "relevant" or "may be relevant" if those terms are understood to require an effective exchange of information. In the interests of conformity with the OECD usage, the term "foreseeably relevant" was adopted. Some members of the Committee preferred the term "may be relevant" on the ground that its meaning was clearer.

7.3. The information covered by paragraph 1 is not limited to taxpayer-specific information. The competent authorities may also exchange other sensitive information related to tax administration and compliance improvement; for example, they might provide information about risk analysis techniques or tax avoidance or evasion schemes. They may also share information they have obtained about aggressive or abusive tax avoidance schemes, such as those promoted by some international accounting firms. In addition, the competent authorities may exchange information relating to a whole economic sector (e.g., the oil, fishing or pharmaceutical industry, the banking sector, etc.) and not to particular taxpayers.

8. The scope of the obligation to exchange information is not limited by articles 1 or 2. That is, the obligation applies not only with respect to information relevant to the proper application of the Convention or to the administration or enforcement of domestic taxes mentioned in article 2, but also to all other domestic taxes, including subnational taxes. In this respect, the United Nations Model Convention and the OECD Model Convention, as amended in 2005, are identical.

8.1. Some members of the Committee expressed concern that sharing of information with respect to all taxes, particularly subnational taxes, might prove burdensome or might raise constitutional and political issues for them. They suggested that the obligation to provide information might be limited to taxes

covered by the Convention, plus one or two important taxes, such as the value added tax (VAT). To accomplish that outcome, the following language might be substituted for paragraph 1:

> "1. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws of the Contracting States *concerning taxes covered by the Convention and [insert specific taxes] of a Contracting State*, in so far as the taxation thereunder is not contrary to the Convention."

8.2. The obligation to provide requested information applies whether or not the person, with respect to whom the information is requested, is a resident of either Contracting State or is engaged in economic activity in either Contracting State. For example, a Contracting State may request information about the bank deposits of an individual who is resident in some third State.

9. The obligation imposed under paragraph 1 is for an *effective* exchange of information. A Contracting State may not avoid its obligations under paragraph 1 through unreasonable time delays, by imposing unreasonable or burdensome procedural barriers, or by intentionally taking steps that prevent it from having certain information otherwise subject to exchange under paragraph 1.

10. The examples provided in paragraphs 10.1 and 10.2 below illustrate the application of paragraph 1 of article 26 of the Convention in particular cases. Some of these examples are drawn from, but are not identical to, the examples provided in paragraphs 6 and 7 of the OECD commentary on article 26. In all of these examples, the requested State (the Contracting State that has been asked for information) has the obligation under paragraph 1 of article 26 of the Convention to provide the requested information.

10.1. Application of the Convention between State A and State B (information must be provided):

(a) State A, where the recipient of royalties under a royalty contract is resident, is attempting to apply article 12 (Royalties). It asks State B, where the payer of the royalty is resident, for information concerning the amount of royalty transmitted;

(b) In deciding whether it is proper to grant to the recipient of a royalty the relief claimed under article 12, State B asks State A whether the recipient is in fact a resident of State A and is the beneficial owner of the royalties;

(c) In computing the taxable profits of a permanent establishment that is located in State A and has its head office in State B, State A may request information from State B about the expenses and profits of the head office and the dealings of the head office with other permanent establishments and associated companies;

(d) Similarly, if an associated company, within the meaning of article 9, is located in State A and another associated company is located in State B, then State A may request information from State B about the profits and expenses of the associated company located in State B and about the dealings of that associated company with any other associated companies and permanent establishments;

(e) State A or State B may request information that may be relevant for the purposes of applying article 25 (Mutual agreement procedure);

(f) State B is attempting to tax an employee resident in State A in accordance with article 15 (Dependent personal services). The employment has been exercised for more than 183 days in State B. That State may request that State A provide it with information on the amount of the income exempted from taxation in State A in accordance with article 23 A (exemption method for relieving double taxation);

(g) State A is attempting to impose a corporate income tax on an entity claiming to be a partnership. State A may request information from State B that would be helpful to it in properly classifying the entity for tax purposes, including information about the way the entity is classified for tax purposes by State B;

(h) State A is being asked to provide to one of its residents a tax credit under article 23 B for income taxes allegedly paid to State B. State A may request from State B information about whether the alleged payment of the tax actually occurred.

10.2. Implementation of domestic laws:

(a) A company in State A supplies goods to an independent company in State B. State A wishes to know from State B what price the company in State B paid for the goods supplied, with a view to a correct application of the provisions of its domestic value added tax;

(b) A company in State A sells goods through a company in State C (possibly a low-tax country) to a company in State B. The companies may or may not be associated. There is no convention between State A and State C, nor between State B and State C. Under the convention between State A and State B, State A, with a view to ensuring the correct application of the provisions of its domestic laws to the profits made by the company situated in its territory, asks State B what price the company in State B paid for the goods;

(c) State A, for the purpose of taxing a company situated in its territory, asks State B, under the convention between A and B, for information about the prices charged by a company in State B, or a group of companies in State B with which the company in State A has no business contacts in order to enable State A to check the prices charged by the company in that State by direct comparison (e.g., prices charged by a company or a group of companies in a dominant position);

(d) A resident of State A holds a bank account in State B, and the income from that account is exempt from tax under the domestic laws of State B. State A may request that State B provide information on the amount of interest income earned on that account;

(e) A financial intermediary invests money of its account holders in State A, earning therein dividends and interest. State A requires that the financial intermediary keep records of the beneficial owners of the accounts but does not routinely request those records in enforcing its domestic laws. State B suspects that some of the beneficiaries of the account holders of the financial intermediary are its residents and are properly taxable under its domestic laws. State B may request that State A obtain for it information on identified taxpayers from the financial intermediary;

(f) A corporation resident in State A has affiliated companies located in State B and State C. State B believes that the affiliated company doing business in its territory has been skimming profits into the affiliated company located in State C. State B may request that State A provide it with information about the profits and expenses of the affiliated company located in State C, whereas domestic law of State A obliges the parent company to keep records of transactions of its foreign subsidiaries.

Paragraph 2

11. A Contracting State cannot be expected to provide confidential financial information to another Contracting State unless it has confidence that the information will not be disclosed to unauthorized persons. To provide the assurance of secrecy required for effective information exchange, paragraph 2 provides that information communicated under the provisions of the Convention shall be treated as secret in the receiving State in the same manner as information obtained under the domestic laws of that State. Sanctions for the violation of such secrecy in that State will be governed by the administrative and penal laws of that State.

12. Of course, the information received under article 26 would be useless, or nearly so, to the requesting State (the Contracting State requesting the information) if the prohibition against disclosure were absolute. Paragraph 2 provides that information received under article 26 can be disclosed to persons and authorities involved in the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to the taxes mentioned in paragraph 1. In addition, it is understood that the information may also be communicated to the taxpayer, his proxy or witnesses in a civil or criminal proceeding.

12.1. As stated in paragraph 12, the information obtained can be communicated to the persons and authorities mentioned and, on the basis of the last sentence of paragraph 2 of the article, can be disclosed by them in court sessions held in public or in decisions which reveal the name of the taxpayer. Once information is used in public court proceedings or in court decisions and thus rendered public, it is clear that from that moment such information can be quoted from the court files or decisions for other purposes even as possible evidence. But this disclosure to the public does not mean that the persons and authorities mentioned in paragraph 2 are allowed to provide on request additional information received.

12.2. If either or both of the Contracting States object to information obtained under article 26 being made public by courts, or, once the information has been made public in this way, to the information being used for other purposes, they should state this objection expressly in their Convention.

13. In general, the information received by a Contracting State may be used only for the purposes mentioned in paragraph 1. If the information appears to be of value to the receiving State for purposes other than those referred to in that paragraph, that State may not use the information for such other purposes without the authorization of the competent authority of the supplying State. That authorization should not be unreasonably withheld.

13.1. In some cases, a Contracting State may prosecute a taxpayer for tax evasion and also for an additional crime, such as money-laundering, that arises out of the

same set of facts. In such circumstances, the receiving State may want to use the information provided for both purposes.

13.2. Similarly, the information received by a Contracting State may not be disclosed to a third country unless there is an express provision in the bilateral treaty between the Contracting States allowing such disclosure.

13.3. Contracting States wishing to broaden the purposes for which they may use information exchanged under this article may do so by adding the following text to the end of paragraph 2:

> "Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorizes such use."

14. The OECD Model Convention, as amended in 2005, includes a provision that would allow the sharing of information obtained under article 26 with persons charged with the oversight of the persons allowed to obtain such information. This provision is also included in paragraph 2 of the United Nations Model Convention.

14.1. The disclosure should be limited to information necessary for those bodies to fulfil their oversight duties. Such oversight bodies include authorities that supervise tax administration and enforcement authorities as part of the general administration of the Government of a Contracting State. Such sharing is permitted only if the persons engaged in oversight activities are subject to confidential requirements at least as strict as those applicable to tax administration and enforcement officials. The competent authorities shall agree as to the bodies that constitute an oversight body within the meaning of this paragraph.

Paragraph 3

15. Paragraph 3 of article 26 contains provisions that limit the obligation of the requested State under paragraph 1. The limitations provided in paragraph 3, however, may be superseded by the provisions contained in paragraphs 4 and 5. The provisions of paragraph 3, read in conjunction with the provisions of paragraphs 4 and 5, should not be read in a way that would prevent an effective exchange of information between the Contracting States. In addition, a Contracting State must disclose to the other Contracting State before it enters into a convention any specific provisions of its laws and administrative practice that it believes entitle it to avoid an obligation otherwise imposed by paragraph 1.

16. Paragraph 3 (a), subject to the limitations provided in paragraphs 4 and 5, contains the clarification that a Contracting State is not bound to go beyond its own internal laws and administrative practice in putting information at the disposal of the other Contracting State. For example, if a requested State is not permitted under its laws or administrative practice to seize private papers from a taxpayer without court authorization, it is not required to make such a seizure without court authorization on behalf of a requesting State even if the requesting State could make such a seizure without court authorization under its own laws or administrative practice. The purpose of this rule is to prevent article 26 from creating an unintentional conflict between a Contracting State's obligation under article 26 and its obligations under domestic law.

16.1. Domestic provisions requiring that information obtained by the tax authorities be kept secret should not be interpreted as constituting an obstacle to the exchange of information under paragraph 3 (a) because the tax authorities of the requesting State are obligated under paragraph 2 to observe secrecy with regard to information received under this article.

16.2. Paragraph 1 obligates a requested State to provide information with respect to all of the taxes of the requesting State, even if the requested State does not have a comparable tax. Paragraph 3 (a) does not remove the obligation to provide information relating to taxes that the requested State does not impose. For instance, a requested State cannot avoid its obligation to provide information helpful to the requesting State in the enforcement of its value added tax merely because the requested State does not have a value added tax. Of course, the requested State may avoid the obligation to supply such information if it cannot obtain that information under its normal administrative procedures, within the meaning of paragraph 3 (b).

16.3. The purpose of paragraph 3 (a) is to avoid traps for the unwary, not to create such traps. A Contracting State that believes that it is not required to obtain certain types of information on behalf of the other Contracting State because of its own laws or administrative practice (including the laws and administrative practice of its subnational governments) must disclose that position in writing prior to entering into a convention containing article 26. It must also disclose the likely effects of that position on its ability to provide an effective exchange of information. For instance, if a Contracting State believes that one of its laws prevents it from providing the other Contracting State with information as to the beneficial owners of its resident companies or other juridical persons, it is obligated to give written notice of that position during the negotiation of the convention, with an explanation of the impact of that law on its obligations in relation to mutual assistance. Depending on the facts and circumstances of the particular case, a failure to disclose may eliminate the right of a Contracting State to invoke paragraph 3 (a) to avoid its obligations under paragraph 1.

16.4. A Contracting State that changes its laws or administrative practice after entering into a convention containing paragraph 3 (a) must disclose that change to the other Contracting State in timely fashion. Depending on the facts and circumstances of the case, such a change may constitute a material breach of the convention. In any event, a failure to provide timely notice of such a change may eliminate the right of a Contracting State to invoke paragraph 3 (a) to avoid its obligations arising under paragraph 1.

16.5. A Contracting State that wishes to expand the scope of the limitation currently provided in paragraph 3 (a) might modify that subparagraph as follows (new language in italics):

> "(a) To carry out administrative measures at variance with the laws and administrative practice of that *Contracting State* or of the other Contracting State *even if that Contracting State knows and fails to disclose that specific provisions of its laws or administrative practice are likely to prevent an effective exchange of information*;"

17. Some countries are required by law to notify the person supplying information and/or the taxpayer subject to an enquiry prior to the release of that information to another country. Such notification procedures may be an important aspect of the

rights provided under domestic law. In some cases, notification may help prevent mistakes (e.g., in cases of mistaken identity) and may facilitate exchange (by allowing taxpayers who are notified to cooperate voluntarily with the tax authorities in the requesting State). Notification procedures may not be applied, however, in a manner that, in the particular circumstances of the request, would frustrate the efforts of the requesting State to prevent avoidance or evasion of taxes. That is, they should not prevent or unduly delay an effective exchange of information. For instance, notification procedures should permit exceptions from prior notification in cases in which the information request is of a very urgent nature or the notification is likely to undermine the chance of success of the investigation conducted by the requesting State.

17.1. A Contracting State that under its domestic law is required to notify the person who provided the information and/or the taxpayer that an exchange of information is proposed should inform its treaty partners in writing that it has this requirement and what the consequences are for its obligations in relation to mutual assistance. Such information should be provided to the other Contracting State before a convention is concluded and thereafter whenever the relevant rules are modified. Depending on the facts and circumstances of the particular case, a failure to disclose may eliminate the right of a Contracting State to invoke paragraph 3 (a) to avoid its obligations under paragraph 1.

18. In general, the requested State is not obligated to carry out administrative measures on behalf of the requesting State that are not permitted under the laws or administrative practice of the requesting State. The purpose of this rule is to prevent a requesting State from using the administrative measures of the requested State to avoid limitations imposed on the requesting State by its own government.

18.1. Different countries will necessarily have different mechanisms for obtaining and providing information. Variations in laws and administrative practice may not be used as a basis for the requested State to deny a request for information unless the effect of these variations would be to limit in a significant way the requesting State's legal authority to obtain and provide the information if the requesting State itself received a legitimate request from the requested State.

18.2. The general rule of paragraph 18 has no application when the legal system or administrative practice of only one country provides for a specific procedure. For instance, a Contracting State requested to provide information about an administrative ruling or advance pricing agreement (APA) it has granted cannot point to the absence of a ruling or APA regime in the requesting State to avoid its obligation under paragraph 1 to provide such information.

19. Most countries recognize under their domestic laws that information cannot be obtained from a person to the extent that such person can claim the privilege against self-incrimination. A requested State, therefore, may decline to provide information if its self-incrimination rules preclude it from obtaining that information or if the self-incrimination rules of the requesting State would preclude it from obtaining such information under similar circumstances. In practice, however, the privilege against self-incrimination should have little, if any, application in connection with most information requests. The privilege against self-incrimination is personal and cannot be claimed by an individual who himself is not at risk of criminal prosecution. In the overwhelming majority of information requests, the objective is to obtain information from third parties such as banks, intermediaries, or the other

party to a contract, and not from the individual under investigation. Furthermore, the privilege against self-incrimination generally does not attach to persons other than natural persons.

20. Subparagraph 3 (b) allows a requested State to avoid an obligation otherwise imposed by paragraph 1 when it cannot obtain the requested items of information in the normal course of its administration or when the other Contracting State could not have obtained that information in the normal course of its administration. The purpose of this rule is to prevent the requesting State from imposing unreasonable burdens on the requested State.

20.1. Information is deemed to be obtainable in the normal course of administration if the information is in the possession of the tax authorities or can be obtained by them in the normal procedure of tax determination, which may include special investigations or special examination of the business accounts kept by the taxpayer or other persons. For instance, if the requested State, as part of its audit policies, obtains information about the appropriateness of the transfer prices used by its taxpayers in dealings with associated companies, it is deemed to be able to obtain similar information about its taxpayers and associated companies on behalf of a requesting State.

20.2. Unless otherwise agreed to by the Contracting States, it shall be assumed that the information requested by a Contracting State could be obtained by that State in a similar situation unless that State has informed the other Contracting State in writing to the contrary.

20.3. It is often anticipated, when a convention is entered into between a developed country and a developing country, that the developed country will have a greater administrative capacity than the developing country. Such a difference in administrative capacity does not provide a basis under subparagraph 3 (b) for either Contracting State to avoid an obligation to supply information under paragraph 1. That is, paragraph 3 does not require that each of the Contracting States receive reciprocal benefits under article 26. In freely adopting a convention, the Contracting States presumably have concluded that the convention, viewed as a whole, provides each of them with reciprocal benefits. There is no necessary presumption that each of the articles, or each subparagraph of each article, provides a reciprocal benefit. On the contrary, it is commonplace for a Contracting State to give up some benefit in one article in order to obtain a benefit in another article.

20.4. Although subparagraphs 3 (a) and 3 (b) do not explicitly provide for reciprocity in benefits, the OECD commentary to article 26 has taken the position that a reciprocity requirement can be inferred from the language of subparagraph 3 (b), which, inter alia, limits the obligation of a Contracting State to supply information obtainable in the normal course of administration of that other Contracting State. In effect, the OECD commentary is reading the term "obtainable" to mean that the other Contracting State has the actual administrative capacity to obtain that information. The alternative reading is that "obtainable" means that the tax administration has the authority to obtain the information, whether or not it has the capacity to exercise that authority. Countries may wish to make clear in their treaty that the Contracting States are obligated to exchange information even if one of the Contracting States has a significantly less advanced capacity for obtaining information about taxpayers. To achieve that result, they might amend subparagraph (b) to read as follows:

"(b) To supply information that cannot be obtained in the normal course of the administration of that Contracting State or is not obtainable under the laws of that Contracting State or of the other Contracting State;"

21. In general, a requested State may decline, under paragraph 3 (c), to disclose information that constitutes a confidential communication between an attorney, solicitor, or other admitted legal representative in his role as such and his client to the extent that the communication is protected from disclosure under domestic law.

21.1. The scope of protected confidential communications should be narrowly defined. Such protection does not attach to documents or records delivered to an attorney, solicitor, or other admitted legal representative in an attempt to protect such documents or records from disclosure required by law. Also, information on the identity of a person such as a director or beneficial owner of a company is not protected from disclosure. Although the scope of protection afforded under domestic law to confidential communications may differ among States, the protection provided under subparagraph 3 (c) does not extend so broadly so as to hamper the effective exchange of information..

21.2. Notwithstanding the provisions of domestic law in the requested State, that State may decline to supply requested communications between attorneys, solicitors or other admitted legal representatives and their clients only if, and to the extent that, such representatives act in their capacity as attorneys, solicitors or other admitted legal representatives and not in a different capacity, such as nominee shareholders, trustees, settlors, company directors, or accountants, or under a power of attorney to represent a company in its business affairs. More specifically, the communication must have been produced in good faith for the purpose of seeking or providing legal advice or for use in existing or contemplated legal proceedings.

21.3. In no event may a requested State decline to disclose communications between attorneys, solicitors or other admitted legal representatives and their clients if those persons have themselves participated with their clients in a plan to commit tax evasion or avoidance.

21.4. A claim that information is protected as a confidential communication between an attorney, solicitor or other admitted legal representative and its client should be adjudicated exclusively in the Contracting State under the laws of which the claim arises. Thus, it is not intended that the courts of the requested State should adjudicate claims based on the laws of the requesting State.

22. Subparagraph 3 (c) also permits a requested State to decline to provide information if the disclosure of that information would reveal any trade, business, industrial, commercial or professional secret or trade process. Before invoking this provision, a Contracting State should carefully weigh if the interests of the taxpayer really justify its application. Secrets mentioned in this subparagraph should not be taken in too wide a sense. A wide interpretation of the provision in many cases would be inconsistent with the purpose of article 26 because it would render ineffective the exchange of information provided for in that article.

22.1. A trade or business secret or trade process is generally understood to mean information which has considerable economic importance and which can be exploited practically and the unauthorized use of which may lead to serious damage (e.g., may lead to severe financial hardship). The purpose of the secrecy exception is to prevent an exchange of information from imposing unfair hardship on taxpayers

by revealing to their competitors or potential competitors valuable secret information and thereby significantly diminishing the commercial value of that information. Secret information that once had substantial commercial value may be disclosed if that information does not have substantial commercial value at the time the information is requested. Information is not secret within the meaning of subparagraph 3 (c) simply because the disclosure of it would embarrass or shame the taxpayer or a third party or may result in the taxpayer having to pay additional taxes or losing income on account of bad publicity. A Contracting State may decide to supply requested information when it finds that there is no reasonable basis for assuming that the taxpayer involved may suffer adverse consequences incompatible with information exchange.

22.2. Secret information may be disclosed to the requesting State if the requested State determines that the risk of disclosure to the public or to competitors is highly unlikely due to the confidentiality requirements set forth in paragraph 2. A document that is protected from full disclosure because it contains protected secret information may be disclosed if the secret information is removed.

22.3. Financial information, including books and records, does not by its nature constitute a trade, business or other secret. In certain limited cases, however, the disclosure of financial information might reveal a trade, business or other secret. For instance, a request for information on certain purchase records may raise such an issue if the disclosure of such information would reveal the proprietary formula used in the manufacture of a product. The protection of such information may also extend to information in the possession of third persons. For instance, a bank might hold a pending patent application for safe keeping, or a secret trade process or formula might be described in a loan application or in a contract held by a bank. In such circumstances, details of the trade, business or other secret should be excised from the documents and the remaining financial information exchanged accordingly.

23. Paragraph 3 (c) includes a limitation with regard to information that concerns the vital interests of the State itself. Under that limitation, Contracting States do not have to supply information the disclosure of which would be contrary to public policy (*ordre public*). This limitation should become relevant only in extreme cases. For instance, such a case could arise if a tax investigation in the requesting State were motivated by political, racial or religious persecution. The limitation may also be invoked when the information constitutes a State secret. For instance, there is no disclosure requirement when sensitive information is held by secret services, the disclosure of which would be contrary to the vital interests of the requested State. Thus, issues of public policy (*ordre public*) rarely arise in the context of information exchange between treaty partners.

24. As discussed above, paragraph 3 may give a requested State the right to refuse to supply information under some circumstances. It is not required, however, to invoke any of the limitations of that paragraph. If the requested State declines to exercise its right under paragraph 3 and supplies the requested information, the information exchanged remains within the framework of article 26. Consequently, the information is subject to the confidentiality rules of paragraph 2. In addition, the affected taxpayer or other third party has no ground for contending that the tax authorities in the requested State have failed to observe the obligation to secrecy imposed on them by domestic law.

25. The United Nations Model Convention does not require the existence of criminal activity in either of the Contracting States for the obligation to exchange

information to arise. Some treaties, nevertheless, do require such criminality activity. In such treaties, it may be important to provide that criminality in the requesting State is sufficient for the obligation to exchange information to arise. As a cautionary measure, some States that do not limit their exchange of information to criminal matters may wish to state specifically in their treaty that dual criminality is not required. To eliminate the possibility of a dual criminality requirement being read into a treaty, the following paragraph might be added as paragraph 6, with the current paragraph 6 renumbered as paragraph 7.

> "6. The obligation to exchange information arises under paragraph 1 whether or not a person under investigation is suspected of criminal activity. In no case shall the provisions of this article be construed to permit a Contracting State to decline to supply information solely because the conduct being investigated would not constitute a crime under the laws of that Contracting State if such conduct occurred in that Contracting State."

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Note by the Coordinator of the Subcommittee on Exchange of Information: proposed revised commentary (2008) on article 26 (paras. 4-6) and proposed code of conduct on cooperation in combating international tax evasion*

Summary

The present note has been prepared by the Subcommittee on Exchange of Information in response to the recommendations made by the Committee of Experts on International Cooperation in Tax Matters at its second and third sessions for the amendment of article 26 (Exchange of information) of the United Nations Model Double Taxation Convention between Developed and Developing Countries (ST/ESA/PAD/SER.E/21). The proposed changes expand the scope of information exchanges to include, for example, all national and subnational taxes. Also some exceptions to an exchange of information have been removed, including the exception for domestic bank secrecy laws. The proposed revised text of article 26 is included in document E/C.18/2008/3. Major changes to the commentary are also recommended to reflect changes to the text of article 26 and to address new issues. The proposed revised commentary (2008) on article 26 is provided in the present document (for paras. 4-6) and in document E/C.18/2008/3 (for paras. 1-3).

* The views and opinions expressed in the present note are those of the Subcommittee on Exchange of Information and do not necessarily represent those of the United Nations. The proposed revised commentary (2008) on article 26 of the United Nations Model Convention is contained in the present document (paras. 4-6) and in document E/C.18/2008/3 (paras. 1-3).

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II. Proposed revised commentary (2008) on article 26 (Exchange of information) of the United Nations Model Convention

B. Commentary on article 26

Commentary on paragraphs 4-6 of article 26

Paragraph 4

26. Paragraph 4 was added to the United Nations Model Convention in 2008. It is taken directly from the comparable provision added to the OECD Model Convention in 2005. As a result, the OECD commentary to paragraph 4 is fully applicable in interpreting paragraph 4 of article 26. The position taken in the OECD commentary is that the addition of this paragraph was intended to assist in the interpretation of article 26 and does not result in a substance change in the obligations implicit in the prior version of article 26.

26.1. According to paragraph 4, a requested State must use its information gathering measures to obtain requested information even though those measures are invoked solely to provide information to the other Contracting State. The term "information gathering measures" means laws and administrative or judicial procedures that enable a Contracting State to obtain and provide the requested information. That is, a requested State does not need to have a domestic tax interest in obtaining the requested information for the obligation to supply information under paragraph 1 to apply.

26.2. As stated in the second sentence of paragraph 4, the obligation imposed by that paragraph generally is subject to the limitations contained in paragraph 3. An exception applies, however, that prevents a requested State from avoiding an obligation to supply information due to domestic laws or practices that include a domestic tax interest requirement. Thus, a requested State cannot avoid an obligation to supply information on the ground that its domestic laws or practices only permit it to supply information in which it has an interest for its own tax purposes.

26.3. For many countries, the combination of paragraph 4 and their domestic law provides a sufficient basis for using their information gathering measures to obtain the requested information even in the absence of a domestic tax interest in the information. Other countries, however, may wish to clarify expressly in the Convention that Contracting States must ensure that their competent authorities have the necessary powers to do so. Contracting States wishing to clarify this point may replace paragraph 4 with the following text:

> "4. In order to effectuate the exchange of information as provided in paragraph 1, each Contracting State shall take the necessary measures, including legislation, rulemaking, or administrative arrangements, to ensure that its competent authority has sufficient powers under its domestic law to obtain information for the exchange of information, regardless of whether that Contracting State may need such information for its own tax purposes."

Paragraph 5

27. Paragraph 5 was added to the United Nations Model Convention in 2008. It is taken directly from the comparable provision added to the OECD Model Convention in 2005. As a result, the OECD commentary to paragraph 5 is fully applicable in interpreting paragraph 5 of article 26. The discussion below of secrecy limitations draws heavily from the OECD commentary. The position taken in the OECD commentary is that the addition of this paragraph was intended to assist in the interpretation of article 26 and does not result in a substance change in the obligations implicit in the prior version of article 26.

27.1. Paragraph 1 imposes a positive obligation on a Contracting State to exchange all types of information. Paragraph 5 is intended to ensure that the limitations of paragraph 3 cannot be used to prevent the exchange of information held by banks, other financial institutions, nominees, agents and fiduciaries, as well as ownership information.

27.2. Paragraph 5 states that a requested State shall not decline to supply information to a requesting State solely because the information requested is held by a bank or other financial institution. Thus, paragraph 5 overrides paragraph 3 to the extent that paragraph 3 would otherwise permit a requested Contracting State to decline to supply information on grounds of domestic bank secrecy laws. Access to information held by banks or other financial institutions may be by direct means or indirectly through a judicial or administrative process. The procedure for indirect access should not be so burdensome and time-consuming as to act as an impediment to access to bank information.

27.3. Paragraph 5 also provides that a Contracting State shall not decline to supply information solely because the information is held by persons acting in an agency or fiduciary capacity. For instance, if a Contracting State has a law under which all information held by a fiduciary is treated as a "professional secret" merely because it was held by a fiduciary, such State could not use such law as a basis for declining to provide the information held by the fiduciary to the other Contracting State. A person acts in a "fiduciary capacity" when the business which the person transacts, or the money or property which the person handles, is not its own or for its own benefit but is held for the benefit of another person and when the fiduciary stands in a relationship to that other person implying and necessitating confidence and trust on the one part and good faith on the other part. A trustee is a common example of a person acting in a fiduciary capacity. The term "agency" is very broad and includes all forms of corporate service providers (e.g., company formation agents, trust companies, registered agents, lawyers).

27.4. Paragraph 5 states that a Contracting State shall not decline to supply information solely because the requested information relates to an ownership interest in a person, including companies and partnerships, foundations or similar organizational structures. Information requests cannot be declined merely because domestic laws or practices may treat ownership information as a trade or other secret.

27.5. Although paragraph 5 limits the ability of a requested State to rely on paragraph 3 to refuse to supply information held by a bank, financial institution, a person acting in an agency or fiduciary capacity or to refuse to supply information relating to ownership interests, that paragraph does not eliminate all protection

under paragraph 3. The requested State may continue to refuse to supply such information if that refusal is based on substantial reasons unrelated to the status of the holder of the requested information as a bank, financial institution, agent, fiduciary or nominee, or to the fact that the information relates to ownership interests.

27.6. A requested State is not necessarily prevented by paragraph 5 from declining under paragraph 3 (b) to supply information constituting a confidential communication between an attorney, solicitor, or other admitted legal representative and his client even if that person is acting in an agency capacity. To qualify for protection under paragraph 3 (b), however, a requested State must demonstrate that the communication between the attorney, solicitor, or other admitted legal representative and his client meets all the requirements of that paragraph, including that the communication is protected from disclosure under domestic law, that the refusal is unrelated to the status of the legal representative as an agent, fiduciary, or nominee, that any documents at issue were not delivered to the legal representative to avoid disclosure, and that non-disclosure would not frustrate an effective exchange of information.

27.7. Contracting States wishing to refer expressly to the protection afforded to confidential communications between a client and an attorney, solicitor or other admitted legal representative may do so by adding the following text at the end of paragraph 5:

> "Nothing in the above sentence shall prevent a Contracting State from declining to obtain or provide information which would reveal confidential communications between a client and an attorney, solicitor or other admitted legal representative where such communications are protected from disclosure under paragraph 3 (b) and when the claim for protection under that paragraph is unrelated to the status of the legal representative as an agent, fiduciary, or nominee."

28. The following examples illustrate the application of paragraph 5:

(a) Company X owns a majority of the stock in a subsidiary company Y, and both companies are incorporated under the laws of State A. State B is conducting a tax examination of business operations of company Y in State B. In the course of this examination the question of both direct and indirect ownership in company Y becomes relevant, and State B makes a request to State A for ownership information of any person in company Y's chain of ownership. In its reply, State A should provide to State B ownership information for both company X and company Y;

(b) An individual subject to tax in State A maintains a bank account with Bank B in State B. State A is examining the income tax return of the individual and makes a request to State B for all bank account income and asset information held by Bank B in order to determine whether there were deposits of untaxed earned income. State B should provide the requested bank information to State A;

(c) Bank A in State A is suspected of entering into secret letters of agreement with some of its depositors that direct the bank to pay interest earned by those depositors to an unrelated offshore bank. State B requests that State A provide it with copies of those secret letters of agreement. Bank A asserts that the letters of agreement are legal documents protected from disclosure under the lawyer-client privilege. State A should provide the requested documents.

Paragraph 6

29. The language of paragraph 6 was taken, with some changes, from the last sentence of paragraph 1 of the Model Convention before its amendment in 2008. Paragraph 6 specifically grants to the competent authorities the authority to establish procedures for an effective exchange of information. The OECD Model Convention does not contain paragraph 6 or an equivalent. The position taken in the OECD commentary is that this authority is implicit in article 26.

29.1. To achieve an effective exchange of information, the competent authorities of the Contracting States must work together to establish procedures for the exchange of information, including routine exchanges, typically in electronic form. Paragraph 6 authorizes the competent authorities to make such arrangements, but it does not give them a mandate to do so.

29.2. Some States may wish to make explicit in their treaty that the competent authorities are obligated not only to exchange information on request but also to establish measures for automatic and spontaneous exchanges of information. Those countries may wish to add the following language to the end of paragraph 6:

> "In addition to responding to specific requests for information, the competent authorities shall exchange information on a routine and spontaneous basis. They shall agree from time to time on the types of information or documents which shall be furnished on a routine basis."

29.3. Some members of the Committee have expressed a concern that information requests from a developed country to a developing country could place excessive burdens on the tax department in the developing country, due to the different capacity of their tax administrations to obtain and provide information. That concern might be alleviated by making the requesting State responsible for extraordinary costs associated with a request for information. In this context, the question of whether a cost of obtaining requested information is extraordinary could be determined not by reference to some absolute amount but by reference to the cost relative to the overall budget of the tax department being asked to provide information. For example, a relative small absolute cost might be extraordinary for a tax department with very limited resources, whereas even a large absolute cost might not be extraordinary for a well-funded department.

29.4. Countries concerned about imposing substantial costs on developing countries might include the following language at the end of paragraph 6:

> "Extraordinary costs incurred in providing information shall be borne by the Contracting Party which requests the information. The competent authorities of the Contracting Parties shall consult with each other in advance if the costs of providing information with respect to a specific request are expected to be extraordinary."

C. Inventory of exchange mechanisms

30. Paragraphs 6-25 of the article 26 commentary of the United Nations Model Convention, as set out below, could be included in a handbook that deals with exchange mechanisms.

Routine transmittal of information

6. A method of exchange of information is that of the routine or automatic flow of information from one treaty country to another. The term "transmitting country" refers to the country transmitting information, and the term "receiving country" refers to the country receiving information. The following are various aspects that the competent authorities should focus on in developing a structure for such routine exchange. In considering routine exchanges of information, it should be recognized that some countries not desiring to receive such information in a routine fashion (or unable to receive it routinely because the transmitting countries do not routinely collect such information) may desire to obtain information of this type under a specific request. Hence, in these situations, items mentioned in the present section should be considered as available for coverage under the next section, entitled "Transmittal on specific request".

Items covered

7. *Regular sources of income*. The items covered under a routine transmittal or exchange of information may extend to regular sources of income flowing between countries, such as dividends, interest, compensation (including wages, salaries, fees and commissions), royalties, rents and other possible items whose regular flow between the two countries is significant. It should be recognized that at present a few countries are not in a position to supply routine information of this type because their tax collection procedures do not provide the needed data.

Transactions involving taxpayer activity. A routine exchange of information may cover certain significant transactions involving taxpayer activity:

(a) Transactions relevant to the treaty itself:

(i) Claims for refund of transmitting country tax made by residents of receiving country;

(ii) Claims for exemption or particular relief from transmitting country tax made by residents of receiving country;

(b) Transactions relevant to special aspects of the legislation of the transmitting country: items of income derived by residents of the receiving country that receive exemption or partial relief under special provisions of the national law of the transmitting country;

(c) Transactions relating to activities in the transmitting country of residents of the receiving country:

(i) Opening and closing by receiving country residents of a branch, office, etc. in the transmitting country;

(ii) Creation or termination by receiving country residents of a corporation in the transmitting country;

(iii) Creation or termination by receiving country residents of a trust in the transmitting country;

(iv) Opening and closing by receiving country residents of bank accounts in the transmitting country;

(v) Property in the transmitting country acquired by residents of the receiving country by inheritance, bequest or gift;

(vi) Ancillary probate proceedings in the transmitting country concerning receiving country residents;

(d) General information:

(i) Tax laws, administrative procedures, etc. of the transmitting country;

(ii) Changes in regular sources of income flowing between countries, especially as they affect the treaty, including administrative interpretations of and court decisions on treaty provisions and administrative practices or developments affecting application of the treaty;

(iii) Activities that affect or distort application of the treaty, including new patterns or techniques of evasion or avoidance used by residents of the transmitting or receiving country;

(iv) Activities that have repercussions regarding the tax system of the receiving country, including new patterns or techniques of evasion or avoidance used by residents of either country that significantly affect the receiving country's tax system.

General operational aspects to be considered

8. The competent authorities should consider various factors that may have a bearing on the operational character of the routine exchange, including its effectiveness. For example:

(a) Countries that are more interested in receiving information on a specific request basis than on a routine basis, in their consideration of the specific request area, should keep in mind items mentioned in this inventory under the heading of routine information;

(b) A minimum floor amount may be fixed to limit minor data;

(c) The routine source of income items may be rotated from year to year, for example, dividends only in one year, interest in another, etc.;

(d) The information to be exchanged routinely need not be reciprocal in all items. Country A may be interested in receiving information on some items but not others; the preferences of country B may extend to different items; it is not necessary for either country to receive items in which it is not interested, nor should either country refuse to transmit information on certain items simply because it is not interested in receiving information on those items;

(e) While the information to be exchanged on income items may not always be significant in itself as regards the income flows escaping tax, the routine exchange may provide indications respecting the degree to which the capital or other assets producing the income flows are escaping tax;

(f) Whether the information on items of income should cover the payee only or also the payer is a further point to be taken into account;

(g) Another factor to be considered is whether the information should cover only residents of the receiving country or also those domiciled therein or citizens thereof, or be limited to any of these categories;

(h) The degree of detail involved in the reporting, e.g., name of taxpayer or recipient, profession, address, etc., may need to be taken into account;

(i) The form and the language in which the information should be provided is a further point to be considered.

Factors to be considered by the transmitting country

9. The transmitting country may wish to give consideration to factors affecting its ability to fulfil the requirements of a routine exchange of information. Such a consideration would presumably lead to a more careful selection of the information to be routinely exchanged rather than to a decision not to exchange information that could be of practical use.

10. Among the factors to be considered are the administrative ability of the transmitting country to obtain the information involved. This, in turn, is governed by the general effectiveness of its administrative procedures, its use of withholding taxes, its use of information returns from payers or others, and the overall costs of obtaining the information involved.

Factors to be considered by receiving country

11. The receiving country may wish to give consideration to factors affecting its ability to use the information that could be received under a routine exchange of information, such as the administrative ability of the receiving country to use the information on a reasonably current basis and effectively to associate such information with its own taxpayers, either routinely or on a sufficient scale to justify the routine receipt of the information.

Transmittal on specific request

12. A method of exchange of information that is in current use is that of a request for specific information made by one treaty country to another. The specific information may relate to a particular taxpayer and certain facets of his situation, or to particular types of transactions or activities, or to information of a more general character. The following are various aspects of the question that the competent authorities should focus on in developing a structure for such exchange of information pursuant to specific requests.

Items covered

13. *Particular taxpayers*. The information that may be desired from a transmitting country with respect to a receiving country taxpayer is essentially open-ended and depends on the factors involved in the situation of the taxpayer under the tax system of the receiving country and the relationship of the taxpayer and his activities to the transmitting country. A specific

enumeration in advance of the type of information that may be within the scope of an exchange pursuant to specific request does not seem to be a fruitful or necessary task. The agreement to provide information pursuant to specific request may, thus, be open-ended as to the range, scope and type of information, subject to the overall constraints to be discussed herein.

14. The request for specific information may arise in a variety of ways. For example:

(a) Information needed to complete the determination of a taxpayer's liability in the receiving country when that liability depends on the taxpayer's worldwide income or assets; the nature of the stock ownership in the transmitting country of the receiving country corporation; the amount or type of expense incurred in the transmitting country; and the fiscal domicile of an individual or corporation;

(b) Information needed to determine the accuracy of a taxpayer's tax return to the tax administration of the receiving country or the accuracy of the claims or proof asserted by the taxpayer in defence of the tax return when the return is regarded as suspect or is under actual investigation;

(c) Information needed to determine the true liability of a taxpayer in the receiving country when it is suspected that his reported liability is wrong.

Particular types of transactions or activities. The exchange on specific request need not be confined to requests regarding particular taxpayers but may extend to requests for information on particular types of transactions or activities. For example:

(a) Information on price, cost, commission or other such patterns in the transmitting country necessary to enable the tax administration of the receiving country either to determine tax liability in a particular situation or to develop standards for investigation of its taxpayers in situations involving possible under-or over-invoicing of exported or imported goods, the payment of commissions on international transactions and the like;

(b) Information on the typical methods by which particular transactions or activities are customarily conducted in the transmitting country;

(c) Information on whether a particular type of activity is being carried on in the transmitting country that may have effects on taxpayers or tax liabilities in the receiving country.

15. *Economic relationships between the countries*. The specific request may extend to requests for information regarding certain economic relationships between the countries which may be useful to a country as a check on the effectiveness of its tax administration activities, for example:

(a) The volume of exports from the transmitting country to the receiving country;

(b) The volume of imports into the transmitting country from the receiving country;

(c) Names of banks dealing in the transmitting country with branches, subsidiaries, etc. of residents of the receiving country.

It should be noted that since items in this category, such as the volume of exports between the countries, are presumably not regarded as secret to the tax authorities in the transmitting country, they may be disclosed generally in the receiving country, as provided in article 26.

Rules applicable to the specific request

16. The competent authorities should develop rules applicable to the transmission of specific requests by the receiving country and to the response by the transmitting country. These rules should be designed to facilitate a systematic operational procedure regarding such exchange that is both efficient and orderly. While the rules may be general in character in the sense that they set standards or guidelines governing the specific request procedures, the rules should also permit discussion between the competent authorities of special situations that either country believes require special handling. The rules should pertain to:

(a) The specificity of detail required in the request by the receiving country, the form of such request and the language of the request and reply;

(b) The extent to which the receiving country must pursue or exhaust its own administrative processes and possibilities before making a specific request; presumably the receiving country should make a bona fide effort to obtain the information for itself before resorting to the specific request procedure;

(c) The conditions affecting the nature and extent of the response by the transmitting country. This aspect should cover the ability of the transmitting country to provide documentary material when the receiving country needs material in that form for use in judicial or other proceedings, including the appropriate authentication of the documents.

Transmittal of information on discretionary initiative of transmitting country (spontaneous exchange)

17. The competent authorities should determine whether, in addition to the routine and specific request methods of exchange of information under which a transmitting country is automatically transmitting information or systematically responding to specific requests by the receiving country, they desire a transmittal of information on the discretionary initiative of the transmitting country itself. Such a transmittal could occur when, in the course of its own activities, the tax administration of the transmitting country obtains information that it considers would be of importance to the receiving country. The information may relate to facets of a particular taxpayer's situation and the relationship of that situation to his liability in the receiving country or to the liability of other taxpayers in the receiving country. Or the information may relate to a pattern of transactions or conduct by various taxpayers or groups of taxpayers occurring in either country that is likely to affect the tax liabilities or tax administration of the receiving country in relation either to its national laws or to the treaty provisions.

18. The competent authorities will have to determine, under the standards governing the exchange of information developed pursuant to the treaty,

whether it is the duty of a transmitting country affirmatively to develop a procedure and guidelines governing when such information is to be transmitted, whether such transmittal is to be considered by the transmitting country but is fully discretionary, or whether such transmittal need not even be considered by the transmitting country. Even if it is agreed that it is the duty of the transmitting country to develop a system for such transmittal, presumably the decision on when the conditions under that system have been met will rest on the discretionary judgement of the latter country.

Use of information received

19. The competent authorities will have to decide on the permissible use of the information received. The decisions on this matter basically depend on the legal requirements set forth in article 26 itself. The extent of the use of information depends primarily on the requirements of national law regarding the disclosure of tax information or on other "security requirements" regarding tax information. This being so, it is possible that the extent of the disclosure or the restrictions on disclosure may vary between the two countries. However, such possible variance need not be regarded as inappropriate or as negating exchanges of information that would otherwise occur if the countries involved are satisfied with such a consequence under article 26 as adopted in their convention.

Recipients of information received through exchange

20. The competent authorities will have to specify, either in detail or by reference to existing comparable rules in the receiving country, who the qualifying recipients of information in that country are. Under article 26 the information can be disclosed, for example:

(a) To administrators of the taxes covered in the Convention;

(b) To enforcement officials and prosecutors for such taxes;

(c) To administrative tribunals for such taxes;

(d) To judicial tribunals for such taxes;

(e) In public court proceedings or in judicial decisions where it may become available to the public if considered appropriate;

(f) To the competent authority of another country (see the section below entitled "Consultation among several competent authorities").

The form in which information is provided

21. The permissible extent of the disclosure may affect the form in which the information is to be provided if it is to be useful to the receiving country. Thus, if the information may be used in judicial tribunals, and if, to be so used, it must be of a particular character or form, then the competent authorities will have to consider how to provide for a transmittal that meets this need. (See also the comment on documents in the section above dealing with rules applicable to the specific request.)

Consultation among several competent authorities

22. Countries may wish to give consideration to procedures developed by the competent authorities for consultations covering more than the two competent authorities under a particular treaty. Thus, if countries A, B and C are joined in a network of treaties, the competent authorities of A, B and C might desire to hold a joint consultation. A joint meeting could be desired whether or not all three countries are directly intertwined by their treaty network. For example, the joint meeting might be desirable where there are A-B, A-C and B-C treaties or where there are A-B and B-C treaties but not an A-C treaty. Countries desiring to have their competent authorities engage in such consultations should provide the legal basis for the consultations by adding the necessary authority in their treaties. Some countries may feel that article 26 permits joint consultation where all three countries are directly linked by bilateral treaties. However, the guideline does not cover joint consultation where a link in the chain is not fully joined, as in the second situation described above. In such a case, it would be necessary to add a treaty provision allowing the competent authority of country B to provide information received from country A to the competent authority of country C. Such a treaty provision could include a safeguard that the competent authority of country A must consent to the action of the competent authority of country B. Presumably, it would so consent only where it was satisfied as to the provisions regarding protection of secrecy in the B-C treaty.

Overall factors

23. There are a variety of overall factors affecting the exchanges of information that the competent authorities will have to consider and decide upon, either as to their specific operational handling in the implementation of the exchange of information or as to their effect on the entire exchange process itself. Such overall factors include those set out below.

Factors affecting implementation of exchange of information

24. These include the following:

(a) The competent authorities should decide on the channels of communication for the different types of exchanges of information. One method of communication that may be provided for is to permit an official of one country to go in person to the other country to receive the information from the competent authority and discuss it so as to expedite the process of exchange of information;

(b) Some countries may have decided that it is useful and appropriate for a country to have representatives of its own tax administration stationed in the other treaty country. Such an arrangement would presumably rest on authority, treaty or agreements other than that in the article on exchange of information of the envisaged double taxation treaty (although, if national laws of both countries permit, this article would be treated as covering this topic), and the arrangement would determine the conditions governing the presence of such representatives and their duties. In this regard, it should be noted that it would not seem necessary that the process be reciprocal, so that it would be appropriate for country A to have its representatives in country B but not vice-

versa if country A considered the process to be useful and country B did not. If arrangements do exist for such representatives, then the competent authorities may want to coordinate with those representatives where such coordination would make the exchange of information process more effective and where such coordination is otherwise appropriate;

(c) Some countries may decide it is appropriate to have a tax official of one country participate directly with tax officials of the other country in a joint or "team" investigation of a particular taxpayer or activity. The existence of the arrangement for most countries would presumably rest on authority, treaty or agreements other than that in the envisaged treaty article on exchange of information, although, if national laws of both countries permit, this article could be treated by the countries as authorizing the competent authorities to sanction this arrangement. In either event, if the arrangement is made, it would be appropriate to extend to such an investigation the safeguards and procedures developed under the envisaged treaty article on exchange of information;

(d) The process of exchange of information should be developed so that it has the needed relevance to the effective implementation of the substantive treaty provisions. Thus, treaty provisions regarding intercompany pricing and the allocation of income and expenses produce their own informational requirements for effective implementation. The exchange of information process should be responsive to those requirements;

(e) The substantive provisions of the treaty should take account of and be responsive to the exchange of information process. Thus, if there is an adequate informational base for the exchange of information process to support allowing one country to deduct expenses incurred in another country, then the treaty should be developed on the basis of the substantive appropriateness of such deduction;

(f) The competent authorities will have to determine to what extent there should be cost-sharing or cost reimbursement with respect to the process of exchange of information.

Factors affecting structure of exchange of information process

25. These include thee following:

(a) It should be recognized that the arrangements regarding exchange of information worked out by country A with country B need not parallel those worked out between country A and country C or between country B and country C. The arrangements should in the first instance be responsive to the needs of the two countries directly involved and need not be fully parallel in every case just for the sake of formal uniformity. However, it should be observed that prevention of international tax evasion and avoidance will often require international cooperation of tax authorities in a number of countries. As a consequence, some countries may consider it appropriate to devise procedures and treaty provisions that are sufficiently flexible to enable them to extend their cooperation to multi-country consultation and exchange arrangements.

(b) The competent authorities will have to weigh the effect of a domestic legal restriction on obtaining information in a country that requests information from another country not under a similar domestic legal restriction. Thus, suppose country A requests information from country B, and the tax authorities in country B are able to go to their financial institutions to obtain such information, whereas the tax authorities in country A are generally not able to go to their own financial institutions to obtain information for tax purposes. How should the matter be regarded in country B? It should be noted that article 26 here permits country B to obtain the information from its financial institutions and transmit it to country A. Thus, country B is not barred by its domestic laws regarding tax secrecy if it decides to obtain and transmit the information. Thus, it becomes a matter of discretion in country B as to whether it should respond, and may perhaps become a matter for negotiation between the competent authorities. It should be noted that many countries in practice do respond in this situation and that such a course is indeed useful in achieving effective exchange of information to prevent tax avoidance. However, it should also be noted that country A, being anxious to obtain information in such cases from other countries, should also recognize its responsibility to try to change its domestic laws to strengthen the domestic authority of its own tax administration and to enable it to respond to requests from other countries. It should be noted that countries that have entered into a tax convention that includes paragraph 5 of article 26 of the United Nations Model Convention are required to provide information to its treaty partner notwithstanding its domestic bank secrecy laws;

(c) In addition to situations involving the legal imbalance discussed above, the competent authorities will have to weigh the effects of a possible imbalance growing out of a divergence in other aspects of tax administration. Thus, if country A cannot respond as fully to a request as country B can because of practical problems of tax administration in country A, then might the level of the process of exchange of information be geared to the position of country A? Or, in general or in particular aspects, should country B be willing to respond to requests of country A even when country A would not be able to respond to requests of country B? This matter is similar to that discussed in the preceding paragraph, and a similar response should be noted;

(d) It should be noted that article 26 authorizes a transmitting country to use its administrative procedures solely to provide information to the requesting country, even when the person about whom information is sought is not involved in a tax proceeding in the transmitting country. Moreover, the transmitting country should, for the purpose of exchange of information, use its own administrative authority in the same way as if its own taxation were involved;

(e) The competent authorities will have to weigh the effect on the process of exchange of information of one country's belief that the tax system or tax administration of the other country, either in general or in particular situations, is discriminatory or confiscatory. It may be that further exploration of such a belief could lead to substantive provisions in the treaty or in national law that would eliminate the problems perceived by the first country and thereby facilitate a process of exchange of information. One possible example of this is the treatment of non-permanent residents;

(f) The competent authorities will have to weigh the effects that the process of exchange of information may have on the competitive position of taxpayers of the countries involved. Thus, if country A has a treaty with country B providing for exchange of information, country A will have to weigh the effect on the structure or process of that exchange of the fact that country C does not have a treaty with country B, so that firms of country C doing business in country B may be subject to a different tax posture in country B than firms of country A. Similarly, even if a treaty with an exchange of information article exists between countries C and B, if the tax administration of country A has more authority to obtain information (to be exchanged with country B) than does the tax administration of country C, or is otherwise more effective in its administration and, therefore, has more information, then a similar difference in tax posture may result. As a corollary, it seems clear that the adequate implementation of exchange of information provisions requires a universal effort of tax administrations to obtain and develop under national laws a capacity for securing information and a competence in utilizing information that is appropriate to a high level of efficient and equitable tax administration.

Periodic consultation and review

26. Since differences in interpretation and application, specific difficulties, and unforeseen problems and situations are bound to arise, provision must be made for efficient and expeditious consultation between the competent authorities. Such consultation should extend both to particular situations and problems and to periodic review of the operations under the exchange of information provision. The periodic review should ensure that the process of exchange of information is working with the requisite promptness and efficiency, that it is meeting the basic requirements of treaty implementation, and that it is promoting adequate compliance with treaty provisions and the national laws of the two countries.

III. Proposed code of conduct on cooperation in combating international tax evasion

31. At the third session of the Committee of Experts on International Cooperation in Tax Matters (29 October-2 November 2007), it was agreed to develop a code of conduct on cooperation in combating international tax evasion.

32. The objective of the code of conduct would be that Member States of the United Nations would adopt a political commitment to fight international tax evasion. The term "tax evasion" could be understood as a wide concept, comprehensive of tax evasion, tax avoidance and tax abusive practices (aggressive tax planning), but not including normal tax planning. It might be understood by "aggressive tax planning" tax planning that goes beyond the policy intent of the law and involves purposeful and deliberate approaches to avoid any type of tax.

33. As a political commitment, it would not affect the respective spheres of competence of Member States of the United Nations and their freedom to design their own tax systems, but the goal would be that, in doing so, they would abide by internationally accepted standards established in this code of conduct.

34. International tax evasion and avoidance have become increasingly important to developing and emerging countries, as globalization has extended to all parts of the world. The tools of tax evasion, abusive tax avoidance and capital flight that have accompanied globalization are undermining the ability of developing and emerging countries to mobilize domestic resources for development and to create the "enabling domestic environment" called for in the Monterrey Consensus. The time has come for countries to act collectively to fight back against these abusive practices. The Committee of Experts, at its 2007 third session, expressed its willingness to play a major role in implementing the Monterrey Consensus by developing a sensible code of conduct that would bring moral pressure to bear on Governments not to facilitate international tax evasion and aggressive tax avoidance.

A. Scope

35. The code of conduct would apply to Governments and their agencies, being the tax measures covered by their laws, regulations and administrative practices.

B. Goals

36. The code of conduct might have the following goals:

(a) To assist in the development of international norms and practical steps that Governments should follow to prevent, and cooperate to fight and avoid, facilitating international tax evasion;

(b) To encourage Governments to approve norms on transparency and effective exchange of information, in particular norms that allow them to supply bank information and information about the beneficial owner;

(c) To encourage Governments to approve accounting norms regarding transparency and public availability, in particular the obligation of recording publicly the structure and the accounts of all taxable entities;

(d) To encourage Governments to avoid the establishment of legal instruments that are intended to confound tax enforcement, such as trusts with undisclosed terms;

(e) To encourage Governments to avoid the establishment of new tax measures that accord advantages only to non-residents or their transactions or advantages granted without any real and substantial economic activity;

(f) To give guidance to members of the private sector, such as banks and accounting firms, that wish to conform to an emerging international standard of conduct;

(g) To give moral support to civil society organizations seeking to prevent international tax avoidance and evasion.

C. Content

37. The code of conduct would set minimum standards that countries should meet with respect to cooperation on measures to combat capital flight and international tax evasion and avoidance.

38. The content of the code of conduct would include the following commitments:

(a) Endorsing the following principles of transparency and effective exchange of information:

(i) the availability of reliable information, in particular bank, ownership, identity and accounting information, and powers to obtain and provide such information in response to a specific request;

(ii) no restrictions on information exchange caused by application of the dual criminality principle, domestic tax interest requirements or bank secrecy;

(iii) the existence of mechanisms for exchange of information upon request;

(iv) the existence of confidentiality rules for information exchanged and respect for safeguards and limitations that apply to taxpayer information;

(b) Avoiding the establishment of legal instruments that are intended to confound tax enforcement or new tax measures that imply advantages only to non-residents without any real and substantial economic activity;

(c) Adopting and enforcing reporting rules, such as rules on large cash transfers.

39. These commitments would be implemented by the following actions:

(a) Unilateral actions: the implementation of these standards may require that countries amend their domestic legislation and practices;

(b) Bilateral actions: the principles of transparency and effective exchange of information will generally be implemented through bilateral agreements relating to tax matters;

(c) Multilateral actions: the standards and other kinds of administrative cooperation can be implemented through multilateral conventions. Additionally, whereas possible, countries are invited to participate actively in relevant international organizations, defending and supporting these standards and principles of transparency and effective exchange of information.

IV. Approval

40. It is understood that this code of conduct will be approved by a procedure followed in the case of other kinds of codes of conduct within the United Nations and other international organizations.

E. Monitoring and reviewing

41. The possibility of a monitoring and review process regarding the implementation of the code could be considered. In that regard, States willing to comply with the code could voluntarily submit themselves to annual appraisal of their conduct and in turn be reviewed by the Committee of Experts on International Cooperation in Tax Matters.